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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 1073

DRIVERS, WAREHOUSE AND DAIRY EMPLOYEES UNION LOCAL NO. 75, Affiliated With International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,
Petitioner,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Wisconsin.

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Milwaukee, Wisconsin,
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ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

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Petitioner,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Wisconsin.

Petitioner prays that a writ of certiorari issue to review the judgment of the Wisconsin Supreme Court entered in the above entitled case on December 3, 1965.

CITATIONS TO OPINIONS BELOW.

The opinion of the Wisconsin Supreme Court is reported at ... Wis. 2d ..., 138 N. W. 2d 180 (Adv.), and is printed in Appendix "A", *infra*, A. p. 1.

The Memorandum Opinion of the Circuit Court of Brown County is unreported but is printed in Appendix "B", *infra*, A. p. 9.

The Findings of Fact, Conclusions of Law, and Memorandum of the Wisconsin Employment Relations Board are not officially reported, but are printed in Appendix "C", *infra*, A. pp. 35-54.

JURISDICTION.

The opinion and judgment of the Court below was entered on December 3, 1965. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257 (3).

QUESTION INVOLVED.

Whether paramount federal law obligating the purchaser of a business to arbitrate disputes arising under a current collective bargaining agreement with the seller is equally applicable to a lessee who obtains possession of the lessor's manufacturing premises, uses its manufacturing equipment, produces the same product, utilizes its trade name for such product, and hires a substantial number of its employees.

STATUTE INVOLVED.

The statute involved is Section 301 (a) of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U. S. C., Sec. 151 *et seq.* Section 301 (a) provides as follows:

> Sec. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the

United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT.

Prior to 1961, the Menominee Sugar Company (hereafter called "Menominee") refined sugar from sugar beets and sugar cane, and sold it under the trade name, "Crystal Pure" (A. pp. 37-38; Finding Nos. 5, 6).[1]

Drivers, Warehousemen and Dairy Employees Union Local No. 75, International Brotherhood of Teamsters (hereafter called the "Union"), entered into a collective agreement with Menominee, effective from July 1, 1960 to June 30, 1963 (A. pp. 36-37; Finding No. 4).

The collective agreement, which covered all "campaign workers, except regular or year round plant employees * * *" (A. p. 36; Finding No. 4; Ex. 1, Art. 1, Sec. 1, A. p. 55), established seniority rights and other conditions of employment for the campaign workers. The seniority provisions expressly contemplated the refinement of cane as well as beet sugar (A. pp. 36-37; Finding No. 4; Ex. 1, Article 15, Sec. 5, A. p. 60). "Campaign workers" are seasonal employees (R. 194-195).

The collective agreement also established a grievance procedure culminating in final and binding arbitration (A. p. 36; Finding No. 4; Ex. 1, Art. 13, A. pp. 57-58).

Prior to December, 1961, Menominee refined both cane and beet sugar, but primarily beet. After Menominee had completed refining in 1961 and laid off the campaign workers, it sold a portion of its sugar beet refining equip-

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[1] References to "A" are to page of the Appendix attached hereto; references to "R" are to the certified record on file with this Court.

ment. The plant and remaining equipment remained idle until July 7, 1962 (A. p. 37; Finding No. 5). "Cane" sugar is refined in the summer, with operations being discontinued in December and resuming in early summer (R. 207-208).

On July 7, 1962, Menominee leased its "processing plant facilities to refine raw sugar", warehouses, and weigh stations for a period of eighteen months to Olavarria and Company of New York and granted it the use of the trade name "Crystal Pure". Olavarria had previously acted as broker for Menominee (R. 208); and during the 1961 refining season, had installed its own cane-refining machinery on Menominee's premises for use by Menominee (R. 193).

After the sale, Menominee retained joint use of the office (A. p. 38). While neither Company had any financial interest in, or control over, the other, the execution of the lease was accompanied by a settlement of pre-existing accounts growing out of their past relationship (Ex. 3; R. 232). Consideration for the lease was a fixed sum per bag of sugar produced by the lessee, with the lessee guaranteeing a minimum production of over ½ million bags during the eighteen month term of the lease. Lessee also had the right to purchase the plant (A. p. 38; Finding No. 6, Ex. 3, R. 235).

About the time the lease was executed, Olavarria learned of the collective agreement between Menominee and the Union (A. p. 38; Finding No. 7).

On July 20, Olavarria formed a wholly-owned subsidiary corporation, Wisconsin Sugar Company (hereafter called "Wisconsin"), to refine cane sugar in the Menominee plant. Wisconsin obtained the names of the campaign employees employed by Menominee Sugar but a story in the local newspaper brought in the job applicants. Wis-

consin then hired 165 campaign workers, 69 of whom had been previously employed by Menominee Sugar (A. pp. 38-39; Finding No. 8). Wisconsin also hired Menominee's personnel manager, and the plant engineer (R. 204).

The Union protested Wisconsin's failure to comply with the collective agreement with respect to seniority, re-hiring, etc., and sought to submit the disputes to arbitration. Menominee, Olavarria, and Wisconsin refused.

Proceedings Below.

The Union filed a complaint with the Wisconsin Employment Relations Board to compel these employers to arbitrate the disputes. A majority of the Wisconsin Employment Relations Board held that Wisconsin Sugar was not obligated to arbitrate the dispute (Conclusion No. 4; A. p. 41).[2]

The trial court affirmed the decision of the Board. The Wisconsin Supreme Court, although acknowledging that federal law governed, held that the obligation to arbitrate did not survive the lease of the plant.

REASONS FOR GRANTING THE WRIT.

1. The decision of the Wisconsin Supreme Court conflicts with the decisions of this Court and with the decisions of the Third and Ninth Circuit Courts of Appeal. *John Wiley & Sons, Inc. v. Livingston*, 376 U. S. 543; *Piano Workers Local 2549 v. Kimball Co.*, 379 U. S. 357, reversing *per curiam* 333 F. 2d 761 (C. A. 7); *Wackenhut Corp. v. Plant Guards*, 332 F. 2d 954 (C. A. 9); *Steelworkers v. Reliance Universal, Inc.*, 335 F. 2d 981 (C. A. 3).

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[2] The only issue presented here arises from the refusal of the lessee (Wisconsin), to submit to arbitration the grievances presented by the Union.

These cases held that the obligation to arbitrate grievances arising under a collective bargaining agreement survived when employers "merged"; when the plant was sold; and when the plant was permanently closed but a new plant was opened in another state.

The principles established in these decisions apply with stronger force to the *lease* of a plant, for a lease transfers management functions for a limited term, after which the plant reverts to the lessor.

The court below emphasized the lack of financial relationship between lessor and lessee[3] and the type of legal instrument used; in short, the form the rearrangement between the employers took (A. pp. 7-8). But, as noted in *Wiley*, the rearrangement of business affairs, which is solely the concern of the employers, must be balanced "by some protection to the employees from a sudden change in the employment relationship." 376 U. S. 543 at 549.

By its holding that the type of rearrangement is important, the decision below encourages employers to experiment with different forms of leasing, or other business arrangements to evade *Wiley*.[4]

Moreover, under the decision below, it must be determined whether there is a lack of substantial continuity not

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[3] In finding lack of "financial relationship", the Board and court below should have considered the following facts: Olavarria had acted as broker for Menominee, had installed its own sugar cane equipment in Menominee plant during the preceding refining season, and had made, on the basis of past relationships, a substantial financial adjustment with Menominee at the time the lease was executed (R. 78, 93; Ex. 3, R. 232).

[4] The lease here permits the lessee to purchase the plant and to apply lease payments to the purchase price (Ex. 3, R. 235).

only from "the standpoint of the employees" but also "from the standpoint of the customers, creditors, and the public". Each "standpoint" must, for obscure reasons, be considered for "[t]he answer to the problem does not rest on only one element but the combination of many" (A. p. 8).

If this decision stands, unions cannot know whether they are entitled to arbitration because they cannot guess how a court will view and weigh the jumble of conflicting standpoints. The new employer will, for the same reasons, be in the dark about his obligations. The result can only be resort to "tests of strength" or, as here, a period of prolonged uncertainty and expensive lawsuits.

This uncertainty can be eliminated if, instead of several standpoints, "the continuity of the identity of the business enterprise is determined solely from the standpoint of employees" (A. p. 8), at least where there is no other bargaining representative whose interests may be affected.[5] Contrary to the Court below, this approach accords with *Wiley;* and, furthers national labor policy.

The decision below also raises the important question whether a closing of the plant for a period of time results in "lack of any substantial continuity of identity in the business enterprise." *Wiley* at 551. The shutdown of the Menominee plant for "the period from January to

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[5] The Court of Appeals for the Second Circuit, in *McGuire v. Humble Oil & Refining Co.,* No. 30113, January 31, 1966, 53 C. C. H., L. C. ¶ 11,026, refused to order arbitration solely because of the presence of an exclusive bargaining agent in the unit which has absorbed the predecessor's employees. 53 C. C. H., L. C. pp. 16,186-87. Not only was there no other bargaining agent present here, but a determination whether there is such a bargaining representative would rarely, if ever, create uncertainty. See, e. g., *John Wiley & Sons, Inc. v. Livingston, supra,* at p. 545.

July" (a period which includes the months when the plant is not used to refine sugar, R. 207-208) was the *sole* fact relied upon by the court below to refute the Union's argument that "the same general business was continuously conducted in the same plant from the standpoint of the campaign employees" (A. p. 8). The court below failed to explicate, however, why the shutdown undermined the Union's argument.

Whether, and in what circumstances, a time gap between the termination of production by the old employer and the commencement of production by the new employer makes *Wiley* inapplicable is a question which this Court has not, as yet, answered. Since it will often occur (1) that a new employer, particularly one who seeks to evade *Wiley* by refusing to retain the old work force, will take a period of time before commencing production, (2) that the predecessor will be unable to transfer his business before ceasing production, or (3) that negotiations between employers will lead to delay, such time gaps and their effects upon the rights of employees and industrial peace present important federal questions.

The facts involved in this case do not justify a departure from *Wiley*. There was here, as in *Wiley*, a continuance of a business enterprise engaged in substantially the same business, using the same equipment to the extent needed, and with substantially the same employees. The plant continued to produce sugar under the same brand name, albeit by a different corporate employer whose cane refining equipment had been installed on the same premises and used by the preceding employer for the refining of sugar cane.

These facts, it is submitted, bring this case squarely within the *ratio decidendi* of *John Wiley & Sons, Inc. v. Livingston*, 376 U. S. 543.

CONCLUSION.

For the reasons stated above, this petition should be granted.

Respectfully submitted,

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Counsel for Petitioner.

APPENDIX "A".

OPINION.

(Filed Dec. 3, 1965.)

Notice.

This opinion is subject to further editing and modification. The official version will appear in the bound volume of the Wisconsin Reports.

No. 71.

August Term, 1965.

State of Wisconsin — In Supreme Court

Drivers, Warehouse and Dairy Employees Union, Local No. 75, etc., — Appellant,

vs.

Wisconsin Employment Relations Board, et al., — Respondents.

Appeal from a judgment of the circuit court for Brown County: Donald W. Gleason, Circuit Judge. Affirmed.

The petitioning union filed a complaint with the Wisconsin Employment Relations Board (WERB) against Menominee Sugar Company (Menominee) and the Wisconsin Sugar Company (Wisconsin), alleging unfair labor practices under sec. 111.06 (1) (f), Wis. Stats., because Wisconsin "as the successor and assign of the collective bargaining agreement" between the union and Menominee would not recognize the agreement. WERB dismissed the complaint, holding Wisconsin was not a successor or an assign of Menominee, was not a party to the collective bargaining agreement, and was not bound by it. Upon a

petition for review to the circuit court the order of WERB was affirmed, and the union appeals. Menominee and Wisconsin have not appeared on this appeal.

Hallows, J. There is no dispute over the facts as found by the WERB. Menominee was engaged in refining sugar from sugar beets in its plant in Brown County and sold its sugar under the trade name of "Crystal Pure." On July 1, 1960, it entered into a three-year collective bargaining agreement with the petitioning union Drivers, Warehousemen and Dairy Employees Union Local No. 75, International Brotherhood of Teamsters (Union). This agreement covered all the part-time plant workers or "campaign workers" and provided for the usual seniority rights, wage, hours, working conditions, check off of dues, grievance procedure, arbitration and other matters. During the summer of 1961 machinery for the refining of cane sugar was installed and Menominee produced some cane sugar for about a month but was primarily engaged in refining sugar beets.

On December 31, 1961, Menominee discontinued operating the refinery, terminated all of its campaign employees, and sold a portion of its sugar-beet-refining equipment which was removed from the plant. As a result, the plant could no longer be used for refining beet sugar. The plant remained idle from January to July 7, 1962, except for a short time Menominee retained five or six shipping employees. On July 7, 1962, Menominee leased its plant, warehouse and equipment to Olavarria & Co. of New York for a period of 18 months. Olavarria & Co. caused Wisconsin to be organized as a wholly-owned subsidiary Wisconsin corporation for the purpose of processing cane sugar and assigned the lease to it. Under the terms of the lease the lessee agreed to pay rent on the basis of a fixed sum per bag of refined sugar and a guaranteed minimum rental and had the right to use the trade name "Crystal Pure." The liabilities and the assets of Menominee were

not assumed in the lease transaction and the lessee did not obligate itself to fulfill any orders or business of Menominee. There is no interest, control or ownership relationship between Menominee and Wisconsin and Olavarria.

About July 20th Wisconsin placed an advertisement in the Green Bay newspaper announcing employment was available and proceeded to hire campaign workers. The company obtained a list of names of Menominee's campaign workers from a Mr. Charlier, a former timekeeper at Menominee who was hired by Wisconsin as its personnel manager. Wisconsin also hired another Menominee supervisory employee as its plant manager. Of the 165 campaign workers hired, 60 were former employees of Menominee, but there is no evidence Wisconsin contacted such employees directly or other than through the public newspaper announcement.

Upon seeing the advertisement the petitioning Union notified Wisconsin that it had a valid labor agreement with the Union because Wisconsin was the successor and assign of Menominee and the Union requested the recall of former employees according to their seniority. The denial by Wisconsin that it was the successor or assign of Menominee and it was bound in any way by the labor contract precipitated this controversy.

The complaint was originally filed on the theory the language of the contract relating to successor and assign was sufficient to bind Wisconsin to the contract. Normally under contract law such language would give a successor or assignee the benefits and subject it to the obligations of such contract only if it assumed the contract. Under one view of labor law, such language in a collective bargaining contract made the issue of whether one was a successor or assign arbitrable under the contract. This view was taken by the dissenting member of the WERB. But after the decision of the WERB *John Wiley & Sons*

v. Livingston (1964), 376 U. S. 543, 84 Sup. Ct. 909, 11 L. Ed. (2d) 898, held the determination of who was bound by a collective bargaining contract was a question for the courts, not the arbitrator.

As stated by the Union in its brief the question whether Olavarria and Wisconsin must arbitrate disputes arising under the collective agreement between the Union and Menominee must be decided by federal law. *Local 174, Teamsters v. Lucas Flour* (1962), 369 U. S. 95, 82 Sup. Ct. 571, 7 L. Ed. (2d) 593; *Tecumseh Products Co. v. Wisconsin E. R. Board* (1964), 23 Wis. (2d) 118, 126 N. W. (2d) 520. And as stated by the trial judge in his exhaustive opinion the "appropriate tribunal in this state to decide whether Wisconsin Sugar Company is the successor and assign of the agreement, whether it is now the employer party to that agreement and whether it is bound by the terms of such agreement, is the Wisconsin Employment Relations Board, in the same respects as that Board is the proper tribunal to determine if Wisconsin and Menominee (assuming they were parties to the agreement) have violated the agreement and are committing unfair labor practice."

Since there is no dispute over the facts, the application of the "emerging federal common law" of collective bargaining agreements is a question of law and the order of the WERB must be sustained on review if correct although based on other considerations.[1] The *Wiley Case* is the only supreme court pronouncement on the issue

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[1] The petition for review of the WERB decision was filed June 13, 1963. While this petition was pending *Wiley* was decided on March 30, 1964. Thereafter on May 25th the matter was heard by the court and the *Wiley Case* was relied upon by the Union as being applicable. On March 11, 1965, the court filed its decision based upon the *Wiley Case*. No request was made to the circuit court to have the matter sent back to the WERB for taking additional testimony and redetermination in view of the *Wiley* decision.

presented in this case. *Wiley* involved a merger of Interscience Publishing Inc., which had a collective bargaining agreement with a union involving about one-half of its employees with John Wiley & Sons, a larger publishing company. As a result Interscience's entity ended and its employees were taken over *en masse* by Wiley. Wiley refused to recognize the bargaining agreement as applicable to the employees formerly covered thereunder and claimed the merger terminated the bargaining agreement. The court rejected this argument and held Wiley & Sons had a duty to arbitrate under the contract because, aside from any effect of a merger under contract law, the merger did not automatically terminate all the rights of the employees and the duty to arbitrate would survive if there existed "a relevant similarity and continuity of operation across the change in ownership." Such fact was found in the Wiley merger by the wholesale transfer of Interscience's employees to the Wiley plant apparently without difficulty. This conclusion of when the duty to arbitrate survives a change in ownership of a business was grounded upon the important role which arbitration plays in effectuating the national labor policy and the importance of maintaining that policy of preventing industrial strife. To such an end, *Wiley* is an important addition to the federal common law on the subject of labor law.

We think *Wiley* stands for the principle that a collective bargaining contract in reference to a particular plant or business survives a change in ownership of such business and binds the new owner and employer if there is a "relevant similarity and continuity of operation across the change in ownership," and conversely, "We do not hold that in every case in which the ownership or corporate structure of an enterprise is changed the duty to arbitrate survives. As indicated above, there may be cases in which the lack of any substantial continuity of identity in the

business enterprise before and after a change would make a duty to arbitrate something imposed from without, not reasonably to be found in the particular bargaining agreement and the acts of the parties involved."

We agree with the Union in its statement of the issue, "under applicable federal law, Olavarria and Wisconsin can only avoid arbitration of their disputes with the Union if they are able to show that there is an absence 'of any substantial continuity of identity in the business enterprise before and after' the time Wisconsin became the employer of campaign workers at Menominee's sugar refining plant."

The Union argues that a lack of any substantial continuity of identity in the business enterprise cannot be shown because Wisconsin, like Menominee, continued to hire campaign workers to refine "Crystal Pure" sugar cane at the Ashwaubenon plant where they performed the same work on the same or same type of equipment. It is further argued that Wisconsin's hiring other campaign workers in addition to hiring Menominee campaign workers is unimportant because the other workers were hired at the expense of the other former Menominee employees. Likewise, there was no lack of continuity of employment because campaign workers are seasonal employees and finally, there is no significant difference in refining cane sugar rather than beet sugar. In addition to *Wiley* the Union relies on *United Steelworkers of Amer. v. Reliance Univ. Inc.* (3rd Cir., 1964), 335 Fed. (2d) 891, and *Wackenhut Corporation v. International U., United Plant Guard W.* (9th Cir., 1964), 332 Fed. (2d) 954.

In the *Reliance Case,* Martin Marietta which had entered into a collective bargaining agreement with the union, was ordered by the federal trade commission to divest itself completely of its Bridgeville plant. Martin Marietta sold the Bridgeville plant as a going concern to

Reliance which assumed all the obligations of the business except for an express disclaimer of the obligations of any collective bargaining agreement. In spite of this disclaimer the court held the duty to arbitrate survived the sale and Reliance was bound by the collective bargaining contract as establishing the law of the shop and constituting the basic charter of its labor relations. Difficulties of adaptation which might arise because of changed circumstances were to be considered in the arbitration process of specific grievances as they arose under the agreement. The court correctly disregarded the disclaimer in applying *Wiley* because: (1) It was against federal public policy where a going concern was taken over, and (2) contract law was not the decisive factor in determining whether the duty to arbitrate survives the transfer of the ownership of the business.

In *Wackenhut* the General Plant Company entered into a labor contract and during its term sold substantially all its assets to Wackenhut which carried on the same business without interruption. This was primarily a service organization and the employees were taken over *en masse*. The court found a substantial similarity of operation and continuity of operation of the business identity before and after the change in ownership. We think these two cases properly applied *Wiley* to the sale of going businesses.

But *Wiley* does not compel Wisconsin to recognize the labor agreement entered into by Menominee because there is a lack of substantial continuity of identity in the business enterprise before and after the change. Wisconsin did not acquire a going business. There was no sale of any assets or liabilities of Menominee or a transfer in any respect of a business. Wisconsin did not obligate itself to fulfill any contracts or other business transactions of Menominee. Wisconsin started its business from scratch, leasing a plant which had been closed almost seven

months. There was no continuity of operation across the change. We think it is of some significance that Wisconsin's business was exclusively refining sugar from cane while Menominee's principal business was refining sugar from beets. While the end product was sugar, the two processes are different and the production of sugar was not the same business operated successively by Menominee and Wisconsin, at least not from the standpoint of the customers, creditors, and the public.

While the form of a transfer is not controlling we must recognize a lease transfers nothing of the business as distinguished from a merger or a sale. If there had been a sale of the business enterprise the leasing of the plant and machinery would have significance in determining continuity. Contrariwise, the lease standing alone without a sale of the business is significant with other factors in indicating a lack of a substantial continuity of identity in the business enterprise. The Union argues the same general business was continuously conducted in the same plant from the standpoint of the campaign employees. While it is true the campaign workers are part-time employees there is no evidence the period from January to July is normally an unemployed period for campaign workers. In addition, we do not think *Wiley* holds that the continuity of the identity of the business enterprise is to be determined solely from the standpoint of employees. The answer to the problem does not rest on any one element but the combination of many. To hold the duty to arbitrate survived would be to make the "duty to arbitrate something imposed from without, not reasonably to be found in the particular bargaining agreement and the acts of the parties involved."

By the Court.—Judgment affirmed.

APPENDIX "B".

DECISION OF THE CIRCUIT COURT OF BROWN COUNTY, BRANCH 1.

(Formal parts omitted.)

A. The Proceedings Before the Wisconsin Employment Relations Board.

The complaint in the proceedings had before the Wisconsin Employment Relations Board (hereinafter called the *Board)*, is entitled:

> "Drivers, Warehouse and Dairy Employees, Union Local No. 75, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Complainant,
>
> vs.
>
> Menomonee Sugar Company and Wisconsin Sugar Company, Inc., Respondents."

The above-named complainant will hereinafter be called the *Union.* The respondents above listed will be referred to herein as *Menominee* (correct spelling) and *Wisconsin.*

The said complaint alleged, in part (with numbering corresponding to the numbered paragraphs thereof), as follows:

> 4. The Union and Menominee executed a collective bargaining agreement effective July 1, 1960, to the last day of June, 1963 a copy of which is attached to the complaint as Exhibit "A" and made a part of the complaint.
>
> 5. During the summer of 1962, Wisconsin was incorporated for the purpose of engaging in refining operations in the plant owned by Menominee. Shortly thereafter, Wisconsin commenced operations in that plant. *As the successor and assign of the collective*

bargaining agreement in existence between Union and Menominee, Wisconsin is now the *Employer party to the collective bargaining agreement and is bound by its terms* (Emphasis supplied by the Court).

6. Immediately upon commencing the operation, *Wisconsin* violated and has continued to violate the terms of the collective bargaining agreement by ignoring it in its entirety and by refusing to recognize letters of complaint filed against the *Respondents* for alleged violations of specific provisions of the agreement. On September 27, 1962, *Wisconsin,* by their attorneys, advised the *Union* that *Wisconsin* "disclaims any responsibility whatsoever to the collective bargaining agreement" between Union and Menominee. A copy of this letter is attached to the complaint as Exhibit "B" and made a part thereof.

7. By the conduct mentioned in the preceding paragraphs of this complaint, the *Respondents* have violated and continue to violate the terms of the collective bargaining agreement, and have refused to recognize any provisions of the agreement, including the grievance procedure and arbitration clause contained in Article XIII of Exhibit "A". Specific grievances in the form of letters of complaint have been ignored by *Respondents,* and *Union* and its members are unable to process grievances or obtain redress for the contract violations because of the *Respondents'* refusal to recognize the contract. By this conduct, the *Respondents* have violated and are violating Section 111.06 (1) of the Wisconsin Employment Relations Act.

In said complaint the Union, among other things, prayed for the following relief:

"An order compelling the *Respondents* to forthwith submit to the *grievance and arbitration procedures*

specified in the agreement all grievances which have arisen or may arise out of alleged violations of the contract" (Emphasis supplied by the Court).

Article 13 of the collective bargaining agreement deals with the subject of "Grievance Procedure" and specifies the manner in which a grievance shall be processed.

The matter of Union v. Menominee and Wisconsin came on for hearing before the Board on November 19th, 1962. Attorney David L. Uelmen appeared for the Union; Attorney Fred N. Trowbridge, Sr., appeared on behalf of Menominee; and Attorney Frank P. Cornelisen appeared for Wisconsin. Commissioner Arvid Anderson presided over the hearing. At the outset thereof Mr. Uelmen stated:

> "Just briefly, this complaint was commenced against both of the Respondents, and its arises out of a *refusal to submit a dispute to arbitration by the Wisconsin Sugar Company.* Relief that was requested in the complaint is an order which would *compel the respondents to submit the grievance for the arbitration procedures specified in the agreement.* The complaint was brought against both respondents because we felt it important to have the record show the exact relationship that exists between them, and we understand that certain denials are being made by one party or the other with respect to their responsibility under the collective bargaining agreement" (Emphasis supplied by the Court).

Ernest Flegenheimer, vice-president and secretary of Menominee, and W. R. Coles, employed by Wisconsin, were both called as witnesses by Mr. Uelmen on behalf of the Union and gave their testimony under oath. Twelve exhibits were admitted into evidence.

When the Union rested, Mr. Uelmen stated, in part, to the Board as follows:

". . . As I said in my opening statement, we seek an order telling the *respondents to submit this matter to arbitration pursuant to the grievance procedure contained in the collective bargaining agreement* . . . the position of Teamsters Local 75 is that the *Wisconsin Sugar Company is a successor and assign of the Menominee Sugar Company* under the terms of our contract and therefore is bound by the terms of the collective bargaining agreement. I think it fair to state that some of the evidence that we have available to us at this hearing—that apparently the Menominee Sugar Company did execute a lease with the Olavarria Company and is at the present time acting solely as a landlord and collecting rents from the plant, and I think also it would be fair to state if that is the situation—and there is no financial relationship between them other than landlord-tenant—that the *Menominee Sugar Company is not responsible* for the violations of the agreement committed by Wisconsin Sugar Company. I don't believe anything could be added to the arbitration proceeding if there is going to be one which would assist us by keeping the Menominee Sugar Company as a party to this particular case. Our primary complaint, and really our only complaint, is against a company that is now operating who is now employing these people and who is now operating the plant and selling the sugar, our complaint is against them for violating the terms of the collective bargaining agreement" (Emphasis supplied by the Court).

Whereupon the following occurred:

"Commissioner Anderson: So you are asking to withdraw the complaint as against——

Mr. Uelmen (interposing): Menominee Sugar Company.

Commissioner Anderson: Menominee Sugar Company.

Mr. Uelmen: Yes.

Commissioner Anderson: Any comment, Mr. Cornelisen?

Mr. Cornelisen: In that regard, none.

Commissioner Anderson: *The complaint will be dismissed, then, with respect to the Menominee Sugar Company.*

Mr. Cornelisen: Are you through?

Mr. Uelmen: Yes."

Upon conclusion of the hearing before the Board, Mr. Uelmen and Mr. Cornelisen were each given time to file written arguments on the case, as well as briefs.

The Union, by motion in writing received by the Board on January 14, 1963, moved the Board for permission to withdraw the position taken at the hearing on November 19, 1962, which resulted in the dismissal of the complaint against Menominee. In this motion the Union stated that such position was inaccurate.

Menominee filed on January 18, 1963, with the Board, written statement of opposition to the Union's motion to withdraw said position, stating in part:

> ". . . the hearing was had, the petition was dismissed, and that is that. The dismissal has the same dignity, and efficacy as if the petition had been dismissed by an adjudication of the Commission and after the determination and the dismissal, it seems to us the only possible attack would be by way of an appeal, and since the petitioner acquiesced in the determination as far as the dismissal is concerned, we also feel that would be futile."

The matter having been heard by the Board, and the Board having considered the evidence, arguments, briefs of counsel, and being fully advised in the premises, made its Findings of Fact, Conclusions of Law, and Order, all

dated the 22d of May, 1963. The Board also made a detailed "Memorandum Accompanying Findings of Fact, Conclusions of Law and Order". It was a two to one decision by the Board, with Morris Slavney, Chairman, and J. E. Fitzgibbon, Chairman, being the majority, and Commissioner Arvid Anderson dissenting. It is designated as "Case VI, No. 8895-Ce-912, Decision No. 6357." The transcript of the record of the proceeding before the Board was filed in this court and is part of the entire record now before the Court for review. In the Memorandum the Board said:

> "At the hearing the Board granted the Union's request to withdraw the complaint as it applied to Menominee. After the close of the hearing the Union moved to reinstate Menominee as a respondent. Menominee filed a motion in opposition thereto. It should be noted that counsel for Menominee was present throughout the duration of the hearing and participated in the examination of witnesses. The Board is of the opinion that it would effectuate the policies of the Act to resolve all issues originally pleaded with respect to the controversy in dispute and therefore the motion of the Union is hereby considered granted and the Board considers Menominee reinstated as a party respondent."

B. Petition for Review of the Decision and Order of the Board. Position of Petitioner, Board, Wisconsin and Menominee.

The matter before the Court is the petition of the Union for the Court to review the decision and order of the Board.

Paragraph 4 of the petition alleges, in part, as follows:

> ". . . that the Petitioner and the Menominee Sugar Company *and its successor or assign, Wisconsin Sugar*

Company, Inc., are parties to a collective bargaining agreement covering the period July 1, 1960, through June 30, 1963; that in July, 1962, Menominee Sugar Company entered into an agreement with the Wisconsin Sugar Company, Inc., the exact details of which are set forth in the Findings of Fact and Conclusions of Law entered by the Wisconsin Employment Relations Board; that subsequently, the Menominee Sugar Company and the Wisconsin Sugar Company, Inc., violated and have continued to violate the terms of the collective bargaining agreement by ignoring it in its entirety and by refusing to recognize letters of complaint filed by the Petitioner for alleged violations of specific provisions of the agreement."

Paragraph 6 of the petition alleges that the Petitioner is aggrieved and directly affected by the Board's order for dismissal of the complaint, in that both the Union and its members are not receiving the benefits specified in the existing collective bargaining agreement. It also alleges that the decision and order of the Board is null and void because:

(a) It is in excess of the statutory authority and jurisdiction of the Board and constitutes an error of law; and

(b) That it is not supported by substantial evidence in view of the entire record as submitted; and

(c) It is arbitrary and capricious.

The position of the Board is that the Findings of Fact, Conclusions of Law, Decision and Order are not void or unlawful for any of the reasons set forth in the petition or for any other reason; that the same are valid and lawful.

The position of Wisconsin is that the decision and order of the Board are not in excess of the statutory authority and jurisdiction of the Board, and do not constitute an er-

ror of law; that the decision and order of the Board are amply supported by substantial evidence; that the said decision is not arbitrary and capricious; that the findings of fact, conclusions of law, and order of the Board are valid and lawful.

The position of Menominee is that the petition should be dismissed as against it, on two grounds:

First, that the complaint against Menominee should not be reinstated for the reason that counsel for petitioner moved before the Board, to dismiss on the merits, and the motion was granted.

Second, in the alternative, in case that position be denied for affirmance of the judgment on the merits.

It is to be noted that in the petition for review, petitioner prays that the order of the Board be annulled and set aside, and *that the Board be ordered to either*:

(a) Entertain the issues of the alleged contract violations on their merits and issue an appropriate order; or, in the alternative,

(b) Enter an order requiring *Menominee and Wisconsin to submit the issues of the alleged contract violations to arbitration* pursuant to the terms of the contract (Emphasis supplied by the Court).

C. Review Confined to the Record; Action Which Court May Take.

Chapter 227 of the Wisconsin Statutes (Administrative Procedure Act) in section 227.20 (1) thereof, makes provision for the scope of review in this matter. The portion of that section which is material herein provides as follows:

"(1) The review shall be conducted by the court without a jury and shall be confined to the record . . .

The court may affirm the decision of the agency, or may reverse or modify it if the substantial rights of the appellant have been prejudiced as result of the administrative findings, inferences, conclusions or decisions being:

(a) Contrary to constitutional rights or privileges; or

(b) In excess of the statutory authority or jurisdiction of the agency, or affected by other error of law; or

(c) Made or promulgated upon unlawful procedure; or

(d) Unsupported by substantial evidence in view of the entire record as submitted; or

(e) Arbitrary or capricious.

(2) Upon such review due weight shall be accorded the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it. . . ."

The 1937 Wisconsin Statutes, in Chapter 111, dealing with Labor Relations, contained the following provision in section 111.10 (6):

"(6) Any person aggrieved by final order of the board granting or denying in whole or in part the relief sought may obtain a review of such order in the circuit court . . . the court . . . shall . . . enter a judgment enforcing, modifying or setting aside, in whole or in part, the order of the board; and the findings of the board as to the facts, if supported by evidence in the record, shall be conclusive."

In a case involving the Wisconsin Labor Relations Board, to-wit: *United Shoe Workers of America, Local 132, et al. v. Wisconsin Labor Relations Board, et al.*, 227 Wis. 569

(1938), the Supreme Court made the following rulings, referring to said board:

1. "The jurisdiction of the circuit court . . . is limited to reviewing an order . . . Certainly the court cannot go beyond the powers conferred upon it by statute. This is not a certiorari nor a mandamus proceeding, but a proceeding, upon petition for review under the act. The legislature has carefully limited the field within which the court may proceed: First, by making the findings of the board conclusive upon the court if supported by evidence; and second, by confining it 'to a review of an order'. What is meant by 'review of an order' of an administrative agency is clearly understood in the law. The court must examine the record to discover whether or not the findings of fact are supported by any evidence if the findings are challenged. If the findings of fact are so supported or are not challenged, it next inquires whether or not the facts found support the conclusions of the board; and, third, whether the board acted within the scope of its statutory powers in making the order or within its jurisdiction as is often said. What is meant in the statute by the word 'modify' is difficult to ascertain. Certainly this court cannot exercise any of the power conferred upon the board. While there has been a departure in many ways from the doctrine of the separation of powers, it has not yet been held that a court can exercise the powers conferred upon an administrative agency and substitute its judgment for the judgment of the administrative agency. This is so clear that it requires neither argument nor citation of authority to support it . . ."

2. "The court cannot substitute its judgment for that of the board as to whether or not any proposed action would 'effectuate the policies of the act'. That is a matter committed wholly to the discretion of the

board itself. Such a conclusion is clearly within the terms of the act and one at which the statute specifically authorizes the board to arrive in the exercise of its discretion. The statute does not authorize the circuit court to review the processes by which the board arrived at its ultimate conclusions. The whole matter is treated upon this appeal as if the board was a commonlaw court. When the board enters an order authorized by the act upon a set of facts which are supported by the evidence, that order is immune from judicial attack. The fact that the board may have given a wrong reason or have entertained a mistaken view of the law is immaterial if in the end it makes an order which the act authorizes it to make on the facts found. It is the order, not the antecedent process, which is reviewable. In reviewing the proceedings of a court, appellate courts may and often do consider the reasons upon which the trial court acted, but the power of the court to review an order of the board is limited as has already been indicated."

In *Century Building Company, Inc. v. Wisconsin Employment Relations Board,* 235 Wis. 376, the Supreme Court said, at page 384:

"The statute does not authorize the trial court to reverse the board for errors in the admission of evidence. *Its sole function is to see that there is credible and competent evidence to sustain the board's findings.* There being evidence in this case which supports the findings, and which is unquestionably credible and competent, we do not find it necessary to determine whether some of the evidence was hearsay, or whether the fact that it was not objected to rendered it competent in any event" (emphasis supplied).

In *Appleton Chair Corporation v. United Brotherhood of Carpenters & Joiners, Millmen's Local No. 1748, et al.,*

238 Wis. 337 (1941), the Supreme Court said, at page 342, referring to certain orders of the Wisconsin Employment Relations Baord:

> "The board reached a conclusion and the evidence fairly sustains the findings. The court cannot exercise the powers conferred on the board as an administrative agency and substitute its opinion for the judgment of the board."

In another case involving the Wisconsin Employment Relations Board, namely, *St. Joseph's Hospital v. Wisconsin Employment Relations Board,* 264 Wis. 396 (1952), the Supreme Court, in referring to a particular finding of the Board, said, at page 401:

> "Finding 20 is a finding of ultimate fact and is of necessity based upon inferences from other testimony before the board. Such inferences may not be based upon conjecture but must be drawn from established facts which logically support them. *The drawing of inferences from other facts in the record is a function of the board and the weight to be given to those facts is for the board to determine. International Union v. Wisconsin E. R. Board,* 258 Wis. 481, 46 N. W. (2d) 185. Such findings, when made, cannot be disturbed by a court unless they are unsupported by substantial evidence in view of the entire record submitted." (Emphasis supplied.)

In *Tecumseh Products Company v. Wisconsin Employment Relations Board,* 23 Wis. (2d) 118, the Supreme Court held:

> "To resolve disputes such as these, the board must apply certain standards, either expressly stated in the agreement or derived from the board's knowledge of industrial relations, if the agreement is silent, to certain determined facts. The application of a standard to certain facts to dispose of a dispute involves a con-

clusion of law . . . *This court, however, will not independently redetermine every legal conclusion of the board. If the board's construction of the agreement is reasonable, this court will sustain the board's view, even though an alternative view may be equally reasonable* . . . The reasonableness of the board's determination will be assessed not only from the point of view of the express criteria for judgment set forth in the agreement, but, because the express standards of the agreement are often purposefully general and indeterminate, the board's determination must also be evaluated in terms of the 'common law of the shop'—general practices and principles of industrial relations which are part of the context in which every collective agreement is negotiated, although not expressed in the contract as criteria for judgment." (Emphasis supplied.)

D. Principal Issue Upon This Review Is Arbitration.

As indicated in Section "A" of this decision, the principal relief demanded *in the complaint* before the Board was an order compelling Menominee and Wisconsin to forthwith submit to the grievance and *arbitration* procedures specified in the agreement, all grievances which have arisen or may arise out of alleged violations of the contract.

The Court at this point calls attention to the Board's Findings of Fact Nos. 5, 6, 7, 8, 9 and 10, and it is unnecessary to repeat here the contents thereof.

On the basis of all of the Findings of Fact, the Board made the following Conclusions of Law:

1. That Menominee and Wisconsin are neither joint employers nor one single employer within the meaning of the Wisconsin Employment Peace Act.

2. That since the alleged violations of the collective bargaining agreement executed by Menominee and Union concerns employes of a firm other than Menominee, Menominee has not violated, and is not violating, any provisions of said agreement, and, therefore, Menominee has not committed, and is not committing, any unfair labor practice within the meaning of section 111.06 (1) (f), or any other provision of the Wisconsin Employment Peace Act.

3. That Wisconsin is not a successor administrator or assign of Menominee, and, therefore, Wisconsin did not become, and is not, a party to any collective bargaining agreement executed by Menominee and Union.

4. That Wisconsin by refusing to proceed to arbitration at the request of Union, on disputes arising under the agreement executed by Menominee and Union, has not violated, and is not violating, the provisions of any agreement applicable and binding upon Wisconsin, and, therefore, Wisconsin has not committed, and is not committing, any unfair labor practice within the meaning of section 111.06 (1) (f), or any other provisions of the Wisconsin Employment Peace Act.

Upon the basis of the Findings of Fact and Conclusions of Law the Board made the following order:

> It Is Ordered that the complaint filed in this proceeding, naming Menominee Sugar Company and Wisconsin Sugar Company, Inc., as respondents, be, and the same hereby is, dismissed."

As stated in Section "B" of this decision the alternative relief prayed for in the *petition for review* is that the Board be ordered to enter an order requiring Menominee and Wisconsin to submit the issues of the alleged contract violations to arbitration, pursuant to the terms of the contract.

At the time of the oral arguments upon the petition for review, the Union's counsel requested *only* that the question of alleged contract violations be submitted to arbitration, and contended that the issue before this Court was *solely that of arbitration*. In asking the Court to decide that Menominee and Wisconsin should be required to submit the issues of alleged contract violations to arbitration, the Union's counsel placed considerable reliance upon the Federal case of *Wiley v. Livingston*, and contended that the matter of arbitration should be reconsidered in the light of such decision.

The cited Federal case is *John Wiley & Sons, Inc., Petitioner, v. David Livingston, etc.*, 376 U. S. 543, 11 L. ed. 2d 898, 84 S. Ct. 909 (decided March 30, 1964), and the following is a brief summary of the facts therein:

A labor union entered into a collective bargaining agreement with Interscience Publishers, Inc., a publishing firm, for a term expiring on January 31, 1962. The agreement did not contain an express provision making it binding on successors of Interscience. On October 2, 1961, Interscience *merged* with the petitioner, John Wiley & Sons, Inc., another publishing firm, and ceased to do business as a separate entity. At the time of the *merger*, Interscience had about 80 employes, of whom 40 were represented by the Union in question. None of Wiley's employees was represented by a union.

In discussions before and after the merger, the Union and Interscience (later, Wiley) were unable to agree on *the effect of the merger on the collective bargaining agreement and on the rights under it of those covered employees hired by Wiley*. The Union's position was that despite the merger, it continued to represent the covered Interscience employees taken over by Wiley and that Wiley was obligated to recognize certain rights of such employees under the Interscience bargaining agreement, such as seniority status, severance pay, etc. Wiley asserted that the

merger terminated the bargaining agreement for all purposes. It refused to recognize the Union as bargaining agent or to accede to the Union's claims on behalf of Interscience employees. No satisfactory solution having been reached, the Union commenced this action to compel the successor corporation to arbitrate, under the bargaining agreement, disputes as to the effect of the merger on the bargaining agreement and on the rights under it of those covered employees hired by the successor corporation.

One of the major questions before the United States Supreme Court was whether a corporate employer (Wiley) must arbitrate with a union under a bargaining agreement between the union and another corporation (Interscience) which has merged with the employer (Wiley).

The United States Supreme Court, in the *Wiley-Livingston* case, held that the obligation to arbitrate survived the merger, and made the following rulings:

1. "We hold that the disappearance by *merger* of a corporate employer which has entered into a collective bargaining agreement with a union does not automatically terminate all rights of the employees covered by the agreement, and that, *in appropriate circumstances, present here,* the *succcessor employer may* be required to arbitrate with the union under the agreement." (Emphasis supplied.)

2. "It would derogate from 'the federal policy of settling labor disputes by arbitration' if a change in the corporate structure or ownership of a business enterprise had the automatic consequence of removing a duty to arbitrate previously established; this is so as much in cases like the present, where the contracting employer disappears into another *by merger,* as in those in which one owner replaces another *but the business entity remains the same.*" (Emphasis supplied.)

In the opinion of the Court the *Wiley-Livingston case* is clearly distinguishable from the instant case. In the first place, *the facts* of the instant case are those which are contained in Findings Nos. 5, 6, 7, 8, 9 and 10 of the Board's Findings of Fact, to which reference is again made without repeating here the contents thereof. It will be observed from a study of such findings that the facts herein differ greatly from those in the *Wiley-Livingston* case.

It was pointed out by the United States Supreme Court in *Wiley-Livingston* that the duty to arbitrate *is of contractual origin,* and said:

> "Thus, just as an employer has no obligation to arbitrate issues which it has not agreed to arbitrate, so a fortiori, *it cannot be compelled to arbitrate if an arbitration clause does not bind it at all.*" (Emphasis supplied.)

In the instant case, on the basis of all of the Findings of Fact, the Board made the conclusion of law: that Wisconsin is not a successor, or administrator, or assign of Menominee, and, therefore, Wisconsin did not become, and is not, a party to any collective bargaining agreement executed by Menominee and Union. To apply the above quotation from *Wiley-Livingston,* Wisconsin "cannot be compelled to arbitrate if an arbitration clause does not bind it at all."

One of the major differences in facts as far as *Wiley-Livingston* is concerned is that in such case there was a "merger." As mentioned by the United States Supreme Court, in speaking of Interscience and Wiley, there was "relevant similarity and continuity of operation across the change of ownership" which was "adequately evidenced by the wholesale transfer of Interscience employees to the Wiley plant, apparently without difficulty." However, in the instant case, the facts are as found by the Board in Nos. 5, 6, 7, 8, 9 and 10 of the Findings of Fact.

In *Wiley-Livingston* there was (1) a merger, (2) and "appropriate circumstances, present here", (3) and a "successor employer". Even under those facts, the language of the United States Supreme Court is that the successor employer "may" be required to arbitrate with the union under the agreement.

Furthermore, in *Wiley-Livingston*, the United States Supreme Court said:

> "We do not hold that in every case in which the ownership or corporate structure of an enterprise is changed the duty to arbitrate survives. As indicated above, there may be cases *in which the lack of any substantial continuity of identity in the business enterprise before and after a change* would make a duty to arbitrate something imposed from without, not reasonably to be found in the particular bargaining agreement and the acts of the parties involved." (Emphasis supplied.)

That the instant case is one of the cases characterized in the above quotation is clearly evident from the "Memorandum Accompanying Findings of Fact, Conclusions of Law and Order" which is part of the record herein, the contents of which it is unnecessary to state or quote here.

It is the opinion of the Court that the order of the Board should not be reversed, based upon the *Wiley-Livingston* decision, as contended by Union's counsel.

E. The Union's Burden of Proof in the Proceeding Before the Board.

As indicated in Section "A" of this decision, the complaint of the Union in the proceeding had before the Board alleged, principally, that:

> (5) Wisconsin is the successor and assign of the collective bargaining agreement between Union and

Menominee; is now the Employer party to that agreement, and is bound by its terms.

(6) and (7) Wisconsin and Menominee have violated, and continue to violate, the terms of the agreement.

Both companies were charged with unfair labor practice.

Section 111.07 (3), relating to proceedings before the Board, provides, in part:

> "Any such proceedings shall be governed by the rules of evidence prevailing in courts of equity, *and the party on whom the burden of proof rests shall be required to sustain such burden by a clear and satisfactory preponderance of the evidence.*" (Emphasis supplied.)

In the case of *Century Building Company, Inc. v. Wisconsin Employment Relations Board*, 235 Wis. 376, the Supreme Court held, with respect to the above-quoted statute:

> "This imposes upon the party seeking to arouse the action of the board the burden of establishing his facts by *a clear and satisfactory preponderance of the evidence.* However, *the standard by which the findings are to be tested by a court upon a petition for review is not the same as that prescribed for the board.* Sec. 111.07 (7), Stats., 1939, provides, in part:
>
> > 'The findings of fact made by the board, if supported *by credible and competent evidence* in the record, shall be conclusive.'
>
> "Thus, *the standards set up for the board are more stringent than those by which its action is to be judged upon a petition to review.* Since the legislature was not required to impose upon the person having the burden of proof the duty of sustaining this burden by *a clear and satisfactory preponderance of the*

evidence, we see no reason why it might not limit the review as it has." (Emphasis supplied.)

In the case of *International Union, United Automobile Workers, Local No. 386 et al. v. Wisconsin Employment Relations Board et al.*, 258 Wis. 481, the first contention of appellants was that findings 15 and 16 of the said Board have no support in the competent credible evidence. The Supreme Court referred to certain evidence which it said "is evidence which the board had a right to believe," and also held:

> "*Credibility is to be determined by the board.* . . . The board found that a causal connection existed between the union and the union leaders' activity on the one hand and the reduced production on the other. The inference is legitimate and may well be drawn. *The drawing of inferences from the facts is a function of the board . . . The credibility of the evidence to establish those facts is for the board to determine* . . . There is other corroborating evidence on the subject which need not be detailed. The evidence establishes the board's findings *beyond the power of the court to modify or set aside, since sec. 111.07 (7), Stats., directs that if there is competent and credible evidence to support them, the findings of fact by the board shall be conclusive.*" (Emphasis supplied.)

Apparently, the Union, on whom the burden of proof rested in the proceeding had before the Board, failed to sustain such burden, by failing to establish, *by a clear and satisfactory preponderance of the evidence*, that Wisconsin is the successor and assign of the collective bargaining agreement between Union and Menominee; and that Wisconsin is now the *employer* party to such agreement and bound by its terms; and that Wisconsin and Menominee have committed the alleged violation and unfair labor practice.

F. Decision and Order of Board Are Not in Excess of Statutory Authority and Jurisdiction.

As mentioned earlier in this opinion, the petition for review alleges that the decision and order of the Board are null and void because in excess of the statutory authority and jurisdiction of the Board.

In *International Union, United Automobile Workers, Local No. 386, et al. v. Wisconsin Employment Relations Board,* 258 Wis. 481, the Supreme Court called attention to the legislative declaration in sec. 111.01 (1), Stats., "that three major interests, including the public interest, are involved and interrelated and that it is to protect the public interest as well as the private ones that the Employment Peace Act is enacted," and said, at page 493:

> "In order to promote employment peace, collective bargaining between employer and employees is recognized and encouraged, and the breach of an agreement so reached is declared an unfair labor practice. *The Board is created as an impartial tribunal by which the interests of the public, the employer, and the employee may be preserved and promoted.* Sec. 111.01 (4). *It is to promote employment peace that the entire act exists,* including the act's designation of unfair labor practices and the *delegation to the board of power to determine and to restrain them. The interpretation of collective-bargaining agreements by the board is wholly devoted to and limited by that purpose* . . .
>
> "So, here, we find a statute to be administered and *a board intrusted with the administration. The interpretation of collective-bargaining agreements by the board is entirely incidental to that administration* and without other purpose or effect. The delegation of judicial power to this extent meets every requirement so well expressed by Mr. Justice Fowler. Ac-

cordingly, we hold that neither the legislature by its designation of power to the board nor the board by exercising that power as it exercised it here has violated sec. 2, Art. VII, of the Wisconsin constitution." (Emphasis supplied.)

It is contended by Union's counsel that Federal law, and not state law, governs the decision of the matters involved herein.

In *Tecumseh Products Company v. Wisconsin Employment Relations Board*, 23 Wis. (2d) 118 (1964), it was alleged in the Supreme Court that the Board lacked jurisdiction. The thrust of the contention was that a state administrative agency, as opposed to a state court, is not empowered to apply Federal law in accordance with sec. 301 (a) of the Labor Management Relations Act of 1947, and the Federal decisions relating thereto. The Federal statute authorized suits involving violations of collective-bargaining contracts to be heard in the Federal district courts. The Supreme Court held:

> "The law to be applied in connection with such suits under sec. 301 (a) was determined to be a federal substantive law of collective-bargaining agreements, as fashioned by the federal courts . . . However, the jurisdiction of the federal courts was found *not to be exclusive; states retained their pre-existing jurisdiction over such disputes.* . . . the United States Supreme Court determined that even if the suit were conducted in a state tribunal, if the issues were of a kind covered by sec. 301 (a), such issues were to be resolved 'according to the precepts of federal labor policy.' *Local 174, Teamsters Union v. Lucas Flour Co.* (1962), 369 U. S. 95, 103, 82 Sup. Ct. 571, 7 L. ed. (2d) 593. . . . in effect, the *Lucas Flour* case determined that although state forums may adjudicate labor-management disputes in industries which affect commerce, they must apply federal substantive law."

"We now turn to the question of whether the W. E. R. B. is authorized to perform this function. The answer to this question depends upon our state law. We consider that *a state is free to allocate judicial power within its own boundaries as it sees fit, without thereby contravening any federal interests* . . ."

"Moreover, *nothing in the substantive federal labor law precludes adjudication by W. E. R. B. of collective-agreement disputes* . . ."

"The Wisconsin statutes prescribing the powers and duties of the W. E. R. B. antedated the existence of a federal substantive law of labor-management agreements, which remained undefined until the Lincoln Mills Case in 1957. However, we believe that the purpose and the policies expressed by the Wisconsin legislature in creating the W. E. R. B. make it clear that *it was intended that the W. E. R. B. have the authority to resolve such disputes in Wisconsin, whether state or federal rules are to be applied.* This is consistent with the desire to substitute the 'processes of justice for the more primitive methods of trial by combat,' Sec. 111.01 (4), Stats."

"We conclude that the W. E. R. B. has jurisdiction to apply federal common law of collective-bargaining agreements in the resolution of disputes under sec. 111.06 (1) (f), Stats. Review of the board's decisions and orders can be had under Ch. 227, Stats." (Emphasis supplied.)

The "Memorandum of Dissent" indicates that Commissioner Anderson was of the opinion that "the question of whether Wisconsin was a successor and assign within the meaning of the labor agreement is a proper subject for *arbitration.*" The majority decided it was *a function of the board* to decide whether Wisconsin was bound by the collective bargaining agreement, and made the deci-

sion that Wisconsin was not a successor, or administrator, or assign of Menominee, and, therefore, that Wisconsin did not become, and is not, a party to said agreement between the Union and Menominee. In the opinion of the Court, the majority is correct.

In the *Wiley-Livingston* case the United States Supreme Court, while pointing out that Federal law controls, also said:

> *"State law may be utilized so far as it is of aid in the developing of correct principles or their application in a particular case."* (Emphasis supplied.)

The complaint in the proceeding before the Board alleged that Wisconsin is the successor and assign of the collective bargaining agreement between Union and Menominee, and that Wisconsin is now the employer party to that agreement and bound by its terms. The complaint charged Wisconsin with violating the agreement and sec. 111.06 (1) (f) of the Wisconsin Employment Relations Act. In order to determine if Wisconsin had violated the agreement and was committing unfair labor practice, it was necessary for the Board to determine if Wisconsin was bound by the contract.

In the *Wiley-Livingston* case the United States Supreme Court held that the question as to whether the provisions of a contract bind a successor, *is not to be decided by an arbitrator, but by an appropriate tribunal.* It said:

> "The threshold question in this controversy is who shall decide whether the arbitration provisions of the collective-bargaining agreement survived the Wiley-Interscience merger, so as to be operative against Wiley. Both parties urge that *this question is for the courts.* Past cases leave no doubt that *this is correct.* 'Under our decisions, whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined

by the Court on the basis of the contract entered into by the parties.' . . . *Here, the question is whether Wiley,* which did not itself sign the collective bargaining agreement on which the Union's claim to arbitration depends, *is bound at all by the agreement's arbitration provision. . . . The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty.* Thus, just as *an employer* has no obligation to arbitrate issues which it has not agreed to arbitrate, so a fortiori, it *cannot be compelled to arbitrate if an arbitration clause does not bind it at all.*" (Emphasis supplied.)

The law of the state of Wisconsin is in accord with the foregoing quotation, and an appropriate tribunal in this state to decide whether Wisconsin Sugar Company is the successor and assign of the agreement, whether it is now the employer party to that agreement and whether it is bound by the terms of such agreement, is the Wisconsin Employment Relations Board, in the same respects as that Board is the proper tribunal to determine if Wisconsin and Menominee (assuming they were parties to the agreement) have violated the agreement and are committing unfair labor practice. This would appear to be correct, in view of the opinions of the Wisconsin Supreme Court in the *International Union* case and the *Tecumseh Products Company* case and the opinions of the United States Supreme Court in the *Wiley-Livingston* case, all previously cited in Section "F" of this decision, as well as the opinion of the Wisconsin Supreme Court in the case of *Dumphy Boat Corp. v. Wisconsin Employment Relations Board,* 267 Wis. 316.

In the *Dumphy* case the Supreme Court said:

"What are the powers with which the legislature has invested W. E. R. B. to deal with such a viola-

tion? The answer is to be found in the provisions of sec. 111.07 . . . *W. E. R. B. is authorized to entertain complaints alleging an unfair labor practice, to conduct a hearing with respect thereto, and to issue both interlocutory and final orders* . . . ."

". . . *Ch. 111, Stats., should be liberally construed to secure the objectives stated in the declaration of policy set forth in sec. 111.01.* Industrial peace will be better promoted by holding that the powers with which W. E. R. B. is invested by secs. 111.07 (4) and 111.10 are cumulative rather than mutually exclusive."

"Because this court in *Local 111 v. Allen-Bradley Co., supra,* held that the courts of this state are without power to specifically enforce a provision in a collective-bargaining agreement for the future arbitration of disputes between the parties, it does not follow that W. E. R. B. cannot be held to be invested with such power that has been denied to the courts . . . ."

"There is nothing to prevent the legislature from conferring powers of a quasi-judicial nature upon administrative agencies with which it does not invest the courts . . . ."

G. Conclusion.

After a careful review of the entire record as submitted, it is the decision and judgment of the Court:

1. That the Findings of Fact, Conclusions of Law, and Order of the Board are not in excess of the statutory authority or jurisdiction of the Board and do not constitute an error of law, as claimed by the Union in the petition for review; and are not affected by other error of law and are not void or unlawful for any other reason, but the same are valid and lawful.

2. That there is substantial credible and competent evidence, in view of the entire record as submitted, to sustain

and support the Findings of Fact, Conclusions of Law, and Order of the Board.

3. That the Findings of Fact, Conclusions of Law, and Order of the Board are neither arbitrary nor capricious.

4. The first prayer of the petition for review, praying that the Board be ordered to entertain the issues of the alleged contract violations on their merits, is hereby denied.

5. The alternative prayer of the said petition that the Board be ordered to enter an order requiring Menominee and Wisconsin to submit the issues of the alleged contract violations to arbitration, is also hereby denied.

6. The petition for review is hereby dismissed on the merits.

7. The Findings of Fact, Conclusions of Law, and Order of the Board are *hereby affirmed* by the Court.

The Attorney General of the state of Wisconsin, as attorney for the Board herein, shall forthwith prepare and submit to the Court for signature the proper final judgment of the Court, in accordance with this decision.

Dated this 11th day of March, 1965.

By the Court,

Donald W. Gleason,

Circuit Judge.

APPENDIX "C".

FINDINGS OF FACTS, CONCLUSIONS OF LAW, ORDER AND MEMORANDUM OF WISCONSIN EMPLOYMENT RELATIONS BOARD.

(Formal parts omitted.)

Findings of Fact, Conclusions of Law and Order.

The above entitled matter having come on for hearing before the Wisconsin Employment Relations Board on

November 19, 1962, at Green Bay, Wisconsin, Commissioner Arvid Anderson being present; and the Board, having considered the evidence and arguments and briefs of Counsel, and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

Findings of Fact.

1. That the Complainant, Drivers, Warehouse and Dairy Employees Union, Local No. 75, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter referred to as the Union, is a labor organization and has its office at 1546 Main Street, Green Bay, Wisconsin.

2. That the Respondent Menominee Sugar Company, hereinafter referred to as Menominee, is a Wisconsin corporation, having its principal offices at Fox River Drive, Green Bay, Wisconsin.

3. That the Respondent Wisconsin Sugar Company, Inc., hereinafter referred to as Wisconsin is a Wisconsin corporation, having its principal offices at Fox River Drive, Green Bay, Wisconsin.

4. That in 1960 the Union entered into a collective bargaining agreement with Menominee, "its successors, administrators and assigns", effective from July 1, 1960 to at least June 30, 1963, covering wages, hours and working conditions for all "campaign workers" employed in the refining of sugar, excluding regular and year-around plant employes, office employes, guards, campaign foremen, outlying receiving station employes and all other supervisors; that said agreement contains, among others, provisions providing for the checkoff of dues, for the processing of grievances through final and binding arbitration, for seniority in layoff and recall, for the establishment of separate regular work weeks during the sugar beet cam-

paign and sugar cane campaign, for cost of living increases the first to be effective July 1, 1962, and a duration clause which in addition to providing that the agreement should be effective until at least June 1, 1963, that it could be renewed for additional one year periods unless terminated by either party giving 60 days notice in writing, and further providing that in the event the cane operation was not put into effect, either party could terminate the agreement on June 30, 1962, by giving the other at least 30 days notice.

5. That prior to December 31, 1961, Menominee was primarily engaged in the operation of refining sugar beets, having refined some cane sugar in the summer of 1961; that on December 31, 1961, and during the week following, Menominee discontinued all sugar beet operations and terminated all of its campaign employees; that since January 3, 1962, Menominee has not employed any campaign employees; that subsequently Menominee sold a portion of its sugar beet refining equipment and caused same to be removed from its premises, making it impossible to refine sugar beets; that the remainder of the equipment owned by Menominee and its plant premises remained idle from January 3, 1962 until July 7, 1962, except that five or six employes in a separate collective bargaining unit, who were represented by another labor organization, were retain[redacted] a short time to ship the sugar beets which had been previously refined.

6. That on July 7, 1962, Menominee entered into an agreement whereby it leased its plant, warehousing and its remaining equipment, for a term of 18 months, to Olavarria and Co., Inc., New York, New York, hereinafter referred to as Olavarria, who as rental for same agreed to pay Menominee a fixed sum per bag of sugar refined in accord with an agreed formula, and in addition thereto Olavarria guaranteed a minimum production during the

18 month period and during any 12 month extension of said lease was to make monthly rental payments in advance; that said lease also granted Olavarria the right to use the trade name, "Crystal Pure" which Menominee formerly used, and joint use with Menominee of its office; and that said lease agreement contained other covenants relating to maintenance, Menominee's removal of its equipment not being used in the refining operations, options to renew, options to purchase, vacation of the premises and settlement of disputes between Olavarria and Menominee by arbitration, and covenants with regard to the settlement of their accounts.

7. That on or about the time the lease was executed, Olavarria's representative W. R. Coles, became aware of the fact that the Union and Menominee were parties to the aforementioned collective bargaining agreement; that on or about July 7, 1962, Olavarria employed a few persons to prepare for full scale operations; that on July 20, 1962, Menominee consented to the assignment of the aforementioned lease to any company affiliated with Olavarria by stock ownership and shortly thereafter, Olavarria incorporated Wisconsin, as its wholly owned subsidiary for the purpose of processing cane sugar at the plant premises formerly occupied by Menominee; that the owners and managers of Menominee have no interest or control over either Olavarria or Wisconsin; that the owners and managers of Olavarria and Wisconsin have no interest or control over Menominee; that neither Olavarria nor Wisconsin assumed any of the liabilities or assets of Menominee; that neither Olavarria nor Wisconsin obligated themselves to fulfill any of the orders or business transactions of Menominee; and that neither Olavarria nor Wisconsin continued the business formerly operated by Menominee.

8. That shortly after July 20, 1962 Wisconsin obtained a list of the names of Menominee's "campaign workers"

through a Mr. Charlier, Menominee's former timekeeper who Wisconsin employed as its Personnel Manager; that Charlier had also participated in the personnel and labor relations decisions of Menominee while in its employ; that Wisconsin also hired Menominee's former plant engineer; that on or about July 20, 1962 Wisconsin placed an advertisement in the Green Bay Press-Gazette announcing that employment was available; that Wisconsin proceeded to hire campaign workers and commenced the refining of raw cane sugar; that at the time of the Board's hearing approximately 69 of the 165 employees of Wisconsin had formerly been employed by Menominee in the bargaining unit covered by the Union's labor agreement.

9. That on August 3, 1962 Menominee received a letter from the Union calling attention to the fact that the Green Bay Press-Gazette on August 1, 1962 had reported that Menominee had arranged to lease or in some manner turn over the operation of its p'ant to another company; that the Union's letter further advised Menominee that its labor agreement contained a successor and assign clause and requested a meeting between Menominee, Wisconsin and the Union; that Menominee on August 3, 1962 replied by letter to the Union to the effect that it had ceased operations and leased its plant and facilities to Olavarria and that it had given a copy of the Union's letter to Coles, Olavarria's representative at Green Bay.

10. That on September 5 and 20, 1962, in a telegram and letters sent to Wisconsin, the Union asserted its claim that a valid labor agreement existed between the Union and Wisconsin, as the successor and assign of Menominee; that the Union therein requested Wisconsin to recall former employees of Menominees according to seniority, to comply with the dues checkoff provisions of the agreement, and to institute the cost of living increases called for in the agreement; that on September 11 and 27, 1962, in letters

to the Union, Wisconsin denied that it was the successor and assign of the agreement and it disclaimed any obligations thereunder; and that on the date of the hearing herein Wisconsin rejected the Union's request to proceed to arbitration on any phase of their dispute.

On the basis of the above and foregoing Findings of Fact, the Board makes the following

Conclusions of Law.

1. That Menominee Sugar Company and Wisconsin Sugar Company are neither joint employers nor one single employer within the meaning of the Wisconsin Employment Peace Act.

2. That since the alleged violations of the collective bargaining agreement executed by Menominee Sugar Company and Drivers, Warehouse and Dairy Employees Union, Local No. 75, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, effective from July 1, 1960 through at least June 30, 1963, concerns employees of a firm other than Menominee Sugar Company, Menominee Sugar Company has not violated, and is not violating, any provisions of said collective bargaining agreement, and, therefore, Menominee Sugar Company has not committed and is not committing any unfair labor practice within the meaning of Section 111.06 (1) (f), or any other provision of the Wisconsin Employment Peace Act.

3. That Wisconsin Sugar Company, Inc., is not a successor or administrator or assign of Menominee Sugar Company and therefore, Wisconsin Sugar Company, Inc. did not become, and is not, a party to any collective bargaining agreement executed by Menominee Sugar Company and Drivers, Warehouse and Dairy Employees Union, Local No. 75, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of

America, effective from July 1, 1960 through at least June 30, 1963.

4. That Wisconsin Sugar Company, Inc., by refusing to proceed to arbitration at the request of Drivers, Warehouse and Dairy Employees Union, Local No. 75, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, on disputes arising under the collective bargaining agreement executed by Menominee Sugar Company and said labor organization, has not violated, and is not violating, the provisions of any collective bargaining agreement applicable and binding upon Wisconsin Sugar Company, Inc., and therefore, Wisconsin Sugar Company, Inc. has not committed, and is not committing, any unfair labor practice within the meaning of Section 111.06 (1) (f), or any other provisions of the Wisconsin Employment Peace Act.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Board makes the following

Order.

It Is Ordered that the complaint filed in this proceeding, naming Menominee Sugar Company and Wisconsin Sugar Company, Inc., as respondents, be, and the same hereby is, dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 22nd day of May, 1963.

Wisconsin Employment Relations Board,

By Morris Slavney /s/,
Morris Slavney, Chairman,

J. E. Fitzgibbon /s/,
J. E. Fitzgibbon, Chairman.

Commissioner Arvid Anderson dissents.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER.

The Pleadings.

In its complaint the Union alleged that Wisconsin was the successor and assign of Menominee's collective bargaining agreement with the Union and by the refusal of both Wisconsin and Menominee to recognize the provisions of said agreement, including the provisions with respect to the grievance and arbitration procedure, said firms have committed unfair labor practices within the meaning of Section 111.06 (1) (f) of the Wisconsin Employment Peace Act. Menominee, in its answer, denied any violation, contending that it ceased operation on January 3, 1962 and that it no longer employed any employes in the bargaining unit covered by the collective bargaining agreement. Wisconsin, in its answer, denied being a successor or assign and disclaimed any liability under the agreement previously executed between the Union and Menominee. At the hearing the Board granted the Union's request to withdraw the complaint as it applied to Menominee. After the close of the hearing the Union moved to reinstate Menominee as a respondent. Menominee filed a motion in opposition thereto. It should be noted that Counsel for Menominee was present throughout the duration of the hearing and participated in the examination of witnesses. The Board is of the opinion that it would effectuate the policies of the Act to resolve all issues originally pleaded with respect to the controversy in dispute and therefore the motion of the Union is hereby considered granted and the Board considers Menominee reinstated as a party respondent.

Background.

The Union and Menominee executed a collective bargaining agreement, covering "campaign employes", which

by its terms was to be effective from July 1, 1961 to at least June 30, 1963. On or about December 31, 1961 Menominee discontinued its "campaign" operations, that of refining beet sugar, and terminated the active employment of its "campaign employes". Since that date Menominee has not engaged in any sugar production. On July 7, 1962 Menominee entered into a lease agreement with Olavarria, whereby the latter firm leased Menominee's plant and facilities and the use of its trade name in exchange for rental based on a fixed sum per bag of sugar refined. There was no understanding or agreement reached between Menominee and Olavarria with respect to the assumption or non-assumption of the aforementioned collective bargaining agreement. Shortly after executing the lease agreement Olavarria assigned same to its wholly-owned subsidiary, Wisconsin. As we have found in the Findings of Fact there is no financial or managerial connection between Menominee and Olavarria or Wisconsin. Neither Olavarria nor Wisconsin are continuing the business formerly operated by Menominee.

In hiring employes for the commencement of its operations, Wisconsin hired a substantial number of employes previously employed by Menominee under the latter's agreement with the Union. Said employes were hired regardless of their seniority with Menominee.

The Union requested Wisconsin to honor the agreement executed by Menominee and the Union with respect to seniority, wages, checkoff and arbitration provisions. Wisconsin has refused to do so and claims that it has no obligations under that agreement.

Positions of the Parties.

The Union, in support of its contentions, claims that (1) Menominee and Wisconsin are joint employers or one

single employer under the agreement and (2) that, in the alternative, Wisconsin is the successor to Menominee or the assign thereof; and therefore that either both Menominee and Wisconsin, or at least Wisconsin, are responsible for the violations of the agreement. The Union submits that all issues involving the interpretation and application of the agreement must be submitted to arbitration.

Menominee denies any violation of the agreement claiming that it ceased operations in January, 1962, prior to the occurrence of the alleged violations, and that it employs no employes who are encompassed in the agreement.

Wisconsin disclaims any responsibility under the agreement arguing that the relationship between Menominee and Wisconsin is that of only landlord and tenant, that Wisconsin is neither the successor nor assign of Menominee, and that in no way did Wisconsin assume any duties under the collective bargaining agreement.

Discussion.

We must first determine whether the Wisconsin Employment Relations Board or whether a Board of Arbitration appointed pursuant to the collective bargaining agreement determines whether Wisconsin is a party, in any way, to the collective bargaining agreement executed by the Union and Menominee. In proceedings involving disputes of alleged violations of a collective bargaining agreement containing provisions for final and binding arbitration we have held disputes of this nature to be subject to arbitration where they appear on their face to be governed by the collective bargaining agreement (*Seaman-Andwall Corp.*[1]). In a subsequent decision, *Central Wisconsin Co-*

[1] Dec. No. 5910, 1/62.

operative Dairies,[2] the Board majority determined that a dispute as to whether the union could apply the collective bargaining agreement to another operation of the successor employer, an operation not originally covered in the agreement with the original employer was not a dispute which on its face was governed by the agreement, and therefore the Board determined the question as to whether the successor employer had violated the agreement by refusing to proceed to arbitration on said issue.[3] In said decision the Board stated in part as follows:

> "In the Seaman-Andwall case we were strongly influenced by the Steelworker trilogy[4] and by the decision of our own Supreme Court in the Dunphy Boat Corporation case.[5] We do not deviate from that decision in this case, but distinguish this proceeding from our ruling in Seaman-Andwall by our findings that the dispute sought to be arbitrated here is not one which, on its face, is governed by the collective bargaining agreement and, therefore, the question of arbitrability is properly before this agency for review.
>
> "We believe such result to be consistent with the proposition enunciated in the Steelworker cases which we construe to confer upon the arbitrator the right to interpret the collective bargaining agreement with respect to disputes arising under the collective bar-

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[2] Dec. No. 5935, 7/62.

[3] Chairman Slavney dissented, concluding that, since the successor employer was in the posture of the "employer" under the agreement and since the agreement did not specify the location of the bargaining unit covered in the agreement, the dispute arose between the parties to the agreement, and therefore said dispute, on its face, appeared to be governed by the agreement.

[4] *Steelworkers v. American Mfg. Co.,* 363 U. S. 546; *Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U. S. 574; *Steelworkers v. Enterprise Wheel and Car Corp.,* 363 U. S. 593.

[5] *Dunphy Boat Corporation,* 267 Wis. 316.

gaining agreement, but does not extend such right to interpret the application of the collective bargaining agreement to operations and parties not covered by the collective bargaining agreement, as is the case here . . .

"We conclude that there is a proper area for administrative review of the question of arbitrability going to the subject matter of the claim sought to be submitted for arbitration. It being our conclusion that the United States Supreme Court has not decided that any and all disputes must be submitted to arbitration upon the demand of one of the parties without regard as to whether the dispute is, on its face, governed by the terms of the collective bargaining agreement.

"In a proceeding to compel arbitration involving a successor corporation the New York District Federal Court determined that under the United States Arbitration Act the issue as to whether the respondent is subject to the terms of the collective bargaining agreement is for the court to decide. The opinion rejected the argument that the Steelworkers cases required that the question of successorship be determined by the arbitrator by stating:

> 'Petitioner's view presupposes that there is an arbitration agreement that is binding upon the respondent, thus assuming the very point in controversy. If petitioner's position were upheld, it would do violence to the judicial process by forcing a stranger to an agreement to submit to arbitration a justiciable issue as to whether he is bound by the agreement.' "[6]

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[6] *Office Employes International Union, Local 153, AFL-CIO v. Ward-Garcia Corp.*, January 18, 1961, 190 Fed. Supp. 448, 47 LRRM 2780-81.

We therefore conclude that the issue as to whether Wisconsin is subject to the terms of the collective bargaining agreement is for the Board to determine.

If the Union established that Wisconsin and Menominee are either a single or joint employer or that Wisconsin is the successor or assign of Menominee the Board would order Wisconsin to proceed to arbitration, for then we would have concluded that Wisconsin is a party to the agreement and that the claims of the Union with respect to the seniority of employes, their wages, and dues check-off were matters subject to the grievance and arbitration provisions of the agreement. It is apparent that the Union's claim against Menominee is predicated on the theory that Menominee is connected with Wisconsin as the employer of the employes involved in the dispute for the Union does not contend that Menominee standing alone has violated their agreement in any respect. Menominee and Wisconsin have no common stock ownership, no common officers, or managerial personnel. There is no evidence to establish that Wisconsin's personnel director or plant engineer have any present employment with Menominee. The inference is to the contrary since at present Menominee has no employes for the personnel director to concern himself with and it operates no equipment and facilities which require the attention of a plant engineer. Under the terms of the lease Menominee has no right to manage or control the personnel practices or the manner or method in which Wisconsin carries on its operation. The lease permits Menominee to occupy office space on the premises for one of its officers. No evidence was adduced that said officer has any function connected with the sugar refining operations carried on by Wisconsin. The fact that the lease agreement provides for rental to be paid Menominee based on the amount of sugar produced by Wisconsin and the fact that said lease agreement permits Wisconsin to use Menominee's brand, "Crystal Pure"

does not establish a single or joint venture in the business. Since Menominee has no control over the amount of sugar produced we do not consider the rental payment arrangement as determinative of the issue. We see in the instant arrangement a situation no different from that of an individual renting an automobile on a mileage basis. The payment for the rental property is determined by the use of that property. The more the use the more the rental. The granting of the right to use the trade name was a portion of the consideration for the payment of the rental. There was no evidence adduced that the lease was not negotiated at arms length for an exchange of considerations at full value. There was no evidence adduced to establish or infer that the transactions between Menominee and Olavarria and between Olavarria and Wisconsin were other than legitimate business arrangements made without any purpose to evade Menominee's responsibility under the collective bargaining agreement. It should be noted that under the terms of the agreement, Menominee, not having put the cane operation in effect as contemplated in the agreement, could very well have terminated the collective bargaining agreement on June 30, 1962, by giving a 30-day notice thereof to the Union. The lease with Olavarria was not entered into until July 7, 1962. There is no basis for finding that Menominee and Wisconsin are joint employers or a single employer.

Does the evidence adduced in this proceeding satisfy the Board that Wisconsin became the successor or assign of Menominee?

The lessee did not acquire the accounts receivable or any of the other general assets of the lessor. The former did not make any arrangements as part of the lease to take over any of the operation or employes of the latter, or to assume its obligations, either those of a business nature or those involving labor relations, including those

in the collective bargaining agreement. Neither Olavarria nor Wisconsin became invested with the rights or assumed the burdens of Menominee. There was no continuity of Menominee's interest or operations by Olavarria or Wisconsin. The uncontroverted evidence established that Wisconsin is neither the successor nor assign of Menominee. We therefore conclude that Wisconsin is not a party to the collective bargaining agreement executed between Menominee and the Union. It has no obligation under that agreement, and therefore, cannot be considered to have violated same in any manner.

In his dissent our colleague makes reference to the Board's decision in *Central Wisconsin Cooperative Dairies* and to the *Livingston* case decided by the Second Court of Appeals in support of his position concerning the effect of a "merger or consolidation of business." At no time did the Union contend that there was a merger or consolidation of the businesses of Menominee and Wisconsin. The operation of refining cane sugar was not a continuing operation from prior to and thereafter subsequent to the assumption of operations by Wisconsin. Menominee had refined cane sugar for approximately one month during the summer of 1961. It had ceased the refining of sugar beets in December, 1961. Wisconsin did not commence its sugar refining operations until the summer of 1962. Although our colleague would have an arbitrator determine all the issues in dispute herein, he concludes that the grievance involves a claim of "employes who have been adversely affected" by the change in operations.

Dated at Madison, Wisconsin, this 22nd day of May, 1963.

Wisconsin Employment Relations Board,
By Morris Slavney /s/,
Morris Slavney, Chairman,
J. E. Fitzgibbon /s/,
J. E. Fitzgibbon, Commissioner.

MEMORANDUM OF DISSENT.

I concur in the result to dismiss the complaint against Menominee, but would also do so on the ground that Complainant's counsel moved to dismiss the complaint with respect to Menominee at the time of the hearing, which motion was granted at that time. I would, therefore, refuse to reinstate the complaint against Menominee.

I would also find that the question of whether Wisconsin was a successor and assign within the meaning of the labor agreement is a proper subject for arbitration. The labor agreement contemplated the possibility of a successor and assign in its preamble. The labor agreement also contemplated that a sugar cane operation might be put into effect, which was done during the period when Menominee operated the facilities. Wisconsin continued to refine cane sugar, succeeded to the right to use the trade name of "Crystal Pure" formerly used by Menominee, hired some of the experienced campaign workers formerly employed by Menominee, retained some of the supervisory personnel of Menominee, employing as its personnel manager the person who had acted in a similar capacity for Menominee. I understand the term successor as it applies to corporations does not require that title pass. The term means less than a sale. *Black's Law Dictionary* defines "successor":

> "Term with reference to corporations, generally means another corporation which, through amalgamation, consolidation or other legal succession, becomes involved with rights and assumes burdens of first corporation."

Corpus Juris Secundum, 83 C. J. S. 770, defines "successor" as follows:

> "The term successor is normally defined as meaning he that follows or continues in anothers place;

one that succeeds or follows; one who follows another into a position; one who succeeds or takes the place of another; one who succeeds to the rights or place of another . . ."

Also see *Words and Phrases*:

"As applied to corporations successor does not ordinarily connote an assignee, but is normally used in respect to corporate entities, including corporations becoming invested with rights and assuming the burdens of another corporation by amalgamation, consolidation, or duly authorized legal succession *and does not contemplate acquisition by ordinary purchase from another corporation*" . . . (Emphasis added) (citing *International Association of Machinists v. Falstaff Brewing Corp.*, 328 S. W. 2d 778, 781.

I believe an order to arbitrate the instant dispute would be consistent with the Board's policy expressed in *Seaman-Andwall, supra*:

"In actions to enforce agreements to arbitration, we shall give arbitration provisions in collective bargaining agreements their fullest meaning, and we shall confine our function in such cases to ascertaining whether the party seeking arbitration in making a claim, which on its face is governed by the contract. We will resolve doubts in favor of coverage."

This ruling followed the federal policy as set forth by the United States Supreme Court in the *Steelworker* trilogy cases, *supra*.

In the *Central Wisconsin Cooperative Dairies* case, supra, the Board had occasion to rule on the question of arbitrability involving a successor company. The Board in that decision held the dispute was not arbitrable. However, the facts in that case were different than this dispute, since the grievance which formed the demand for

arbitration in the *Central Wisconsin Coop. Dairies* case did not assert that the rights of the employes under the terms of the labor agreement were in any way adversely affected by the merger and since the successor company had recognized the applicability of the labor agreement to the employes of the former company. In that case we said:

> "This is not to suggest that a proper demand for arbitration might not be made in the event of a merger or consolidation. If as the result of such merger it could be shown that the contract rights of the employes covered by the original contract were adversely affected in a particular manner as a consequence of such merger, a proper question for arbitration could arise. In this proceeding no such question has arisen and no dispute as to the application of the agreement to the former employes of the Portage operation."

In this proceeding the Union's demand to apply the contract has been refused by the alleged successor corporation under circumstances where the employment rights of the former employes of Menominee have been very directly and adversely affected.

The Second Court of Appeals has had recent occasion to order arbitration of a dispute over whether a labor agreement was binding on a successor corporation.[7] The Court ordered arbitration although the labor agreement did not contain a successor and assigns clause. After concluding that the collective bargaining agreement did not terminate with consolidation Judge Medina wrote:

> ". . . And we reach this conclusion despite the fact that the agreement contains no statement that its terms are to be binding upon Interscience 'and its successors', and the further fact that neither of the parties had a possible consolidation in mind when the

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[7] *Livingston v. John Wiley & Sons,* U. S. Ct. of App., 52 LRRM 2223, January 11, 1963, Certiorari granted May 13, 1963.

terms of the agreement were negotiated and settled. Not only would a contrary rule involve manifest injustice, a circumstance not to be lightly disregarded or brushed aside; it would be a breeder of discontent and unharmonious relations between employer and employees, and a source of unnecessary and disrupting litigation. . . . Thus, while we do not hold that the consolidation did not *ipso facto* terminate all rights of the Union and the employes created by or arising out of the collective bargaining agreement, we do not decide what those rights are. . . . Our decision, then, cannot be construed as holding generally that collective bargaining agreements survive consolidation. We merely hold that, as we interpret the collective bargaining agreement before us in the light of Supreme Court decisions enunciating the federal policy of promoting industrial peace and stability, especially with reference to arbitration procedures set up in collective bargaining agreements, we cannot say that it was intended that this consolidation should preclude this Union from proceeding to arbitration to determine the effect of the consolidation on the contract and on the rights of the employees arising under the contract."

I believe the reasoning of Judge Medina quoted above and the concurring opinion of Judge Kaufman can be applied to this case. Judge Kaufman wrote:

". . . We hold that the collective bargaining agreement between Interscience (predecessor) and the Union does not clearly remove from the scope of arbitration the following questions: (1) Whether the collective bargaining agreement as a whole survived the consolidation of Interscience (predecessor) and Wiley (successor); . . .

"Although the collective bargaining agreement contains no express provision making the obligations

binding upon the successors of the parties, our decision today, in effect, permits the arbitrator to 'imply' such a provision into the agreement if, under the circumstances present here such an implication is proper. . . ."

I feel it would be most inequitable to conclude that while the contract would be binding in the event of an outright sale, which was a possibility under the terms of the lease, that an arbitrabal question not even arise in the case of a "lease". Wisconsin "leased" the plant, machinery facilities and the right to use the trade name of "Crystal Pure" as well as employed certain experienced employes including supervisory employes for the sole purpose of continuing the operation of refining cane sugar. The Union should have the right to bring before an arbitrator the question of whether this "lease" is one of the possible types of successorship which the parties contemplated when they made their labor agreement. I would thus conclude that the dispute over whether the "lease" constitutes a successorship, presents an arbitrable question "on its face" because the labor agreement expressly binds successors and assigns. Whether an arbitrator would determine that the labor agreement is binding on Wisconsin is for him to decide. We have said that doubts as to arbitrability should be resolved in favor of coverage. I would have resolved any doubts in favor of arbitration of the Union's grievance which involves the very real claim of employes who have been adversely affected by the change in operations.

Arvid Anderson, Commissioner.

EXHIBITS.

No. 1.

Menominee Sugar Company Campaign Workers Agreement.

This Agreement made and entered into this .... day of ....., 1960, by and between the Menominee Sugar Company, a Wisconsin Corporation, of Green Bay, Wisconsin, its successors, administrators, and assigns (hereinafter referred to as the Employer), and the Drivers, Warehouse and Dairy Employee's Union, Local No. 75, affiliated with the I. B. of T. C. W. and H. of America (hereinafter referred to as the Union), agree to be bound by the following terms and provisions:

Article 1. Union Recognition, Union Shop, and Check-Off.

Section 1. (a) The Union is hereby recognized as the exclusive bargaining agent for all of the (campaign workers) employed by the Company at Green Bay, Wisconsin, as herein defined.

The term "employee" as used in this agreement is to include all campaign workers, except regular or year round plant employees, office employees, guards, campaign foreman, outlying receiving station employees, and all other supervisors as defined by the Act.

(b) All present employees who are members of Local Union on the effective date of this sub-section shall remain members of the Local Union in good standing as a condition of employment. All present employees who are not members of the Local Union and all employees who are hired hereafter shall become and remain members in good standing of the Local Union as a condition of employment on and after the thirty-first (31st) day following

the beginning of their employment, or on and after the thirty-first (31st) day following the effective date of this sub-section, whichever is the later.

This provision shall be made and become effective as of such time as it may be made and become effective under the provisions of the National Labor Relations Act and the Wisconsin Employment Relations Act, but not retroactively.

(c) Nothing contained in this Section shall be construed so as to require the Employer to violate any applicable law.

Section 2. (a) A new employee shall work under the provisions of this agreement but shall be employed only on a thirty (30) day trial basis, during which time he may be discharged without further recourse. Provided, however, that the Employer may not discriminate against union members. After thirty days the employee shall be placed on the campaign workers' regular seniority list, and his seniority shall commence as of the date of employment.

(b) The Employer agrees to deduct from the pay of all employees upon proper written authority regular union dues and initiation fees and remit to the Secretary-Treasurer of the Local Union No. 75 once each month. No deduction shall be made which is prohibited by applicable law.

• • • • • • • •

Article 6. Individual Agreement.

The Employer agrees not to enter into any agreement or contract with his employees individually or collectively, which in any way conflicts with the terms and provisions of this agreement. Any such agreement shall be null and void.

2.

* * * * * * * *

Article 8. Discharge or Suspension.

The Employer shall not discharge or suspend any employee without just cause, but shall give at least one warning notice of the complaint against such employee in writing, and a copy of the same to the Union affected; except no warning notice need be given to an employee before he is discharged or suspended if the cause of such discharge or such suspension is dishonesty, drunkenness, refusal to obey orders, or recklessness resulting in a serious accident resulting in either damage to person or property within the scope of the employee's responsibilities. The warning notice as herein provided shall not remain in effect longer than between the date of the warning notice and the end of the current campaign period thereafter.

Any discharged or suspended employee must within a period of twenty-four (24) hours present his grievance in accordance with the grievance procedure herein provided in Article 13.

* * * * * * * *

Article 13. Grievance Procedure.

A grievance shall be processed as follows:

1. The grievance shall be presented to and discussed between the empoyee's supervisor, the employee, and the steward, if requested.

2. If a satisfactory settlement does not result from such discussion, the grievance shall be discussed with the steward and the superintendent.

3. If not settled satisfactorily in this discussion, the grievance shall be referred to the general manager, or anyone selected by the general manager to act, and the business representative.

4. If not settled satisfactorily in that discussion, either party may notify the other within five (5) days (excluding Sundays and holidays) after a deadlock in step (3) of his desire to arbitrate.

Grievances shall be presented on a written form furnished by the Union, made in triplicate, one copy to be retained by the Union, and one copy to be furnished to the Employer's representative in step (1) above.

The party desiring arbitration shall notify the other party within the hereinbefore provided five (5) days of its desire to arbitrate, and within five (5) days the Employer and the Union shall each select one member who shall act on the Board of Arbitration and the two so selected shall select a third. If the two members cannot agree upon a person to serve as a third member within five (5) days, such third member shall be a member or an appointee of the Wisconsin Employment Relations Board. The three (3) member Board of Arbitration shall meet within five (5) days (excluding Sundays and Holidays), and shall conduct hearings and receive testimony relating to the misunderstanding or dispute and shall submit their findings and decision within five (5) days (exclusive of Sundays and holidays) after the completion of the hearing. The decision of the Board shall be final and binding on both parties to this Agreement.

It is understood that the Board of Arbitration shall not have the authority to change, alter, or modify any of the terms or provisions of this agreement.

The expense of the third member acting as arbitrator shall be divided equally between the parties to this Agreement.

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Article 15. Seniority.

Section 1. Seniority rights for employees shall prevail. The Employer agrees to publish and post an agreed upon list of campaign workers in their order of seniority.

Seniority shall be determined from the first date of employment on the available company records dating back at least five years from the effective date of this agreement. If an employee can, by undisputed proof of seniority beyond the above period, establish a prior date of continuous campaign employment, it shall be recognized. Any question as to an employee's seniority shall be referred to the Employer and the Union for settlement.

Section 2. The accepted rules of seniority shall apply in lay-off and recall. The last man hired shall be the first laid off and in returning the last man laid off shall be the first to be recalled if capable to perform such work, and in no case shall any new help be hired until all persons laid off are reinstated.

Section 3. Seniority shall be terminated for the following reasons:

1. Voluntary quit.

2. Absent for two (2) successive days without permission, if not due to illness or accident in which the employee will notify the time keeper within the aforementioned two (2) days.

3. Discharge for cause.

4. Lapse of approved Leave of Absence.

Section 4. Prior to the start of a campaign all employees on the seniority list of the previous campaign shall be notified in writing at his or her last known address for availability for return to work in accord with the normal company procedure. Employees failing to notify of avail-

ability or report for work as directed shall lose their seniority.

Section 5. If for reasons beyond the control of an employee he is unable to respond to a notification of work for the cane campaign and notifies the employer of such situation, he shall be given the same notification of availability for the subsequent sugar beet campaign without loss of seniority unless in the event the company is unable to obtain sufficient number of employees from the current seniority list to conduct the cane campaign.

5.

The junior employee shall respond to the cane campaign or automatically lose his seniority.

Section 5. In the event the company hires more than one new employee with identical starting dates, the employees involved shall be placed on the seniority list in alphabetical order.

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Article 25. Duration of Agreement.

This agreement shall become effective on the first (1st) day of July, 1960, and shall remain in full force and effect to and including the last day of June, 1963, and shall renew itself for additional one (1) year periods until and unless either party, at least sixty (60) days before the expiration of this agreement, notifies the other party in writing that they desire to terminate or alter this agreement.

It is further agreed that in the event the cane operation, as herein states, is not put into operation, in which case, either party may, at least thirty (30) days prior to June 30, 1962, serve written notice to the other party of their desire to terminate this agreement.